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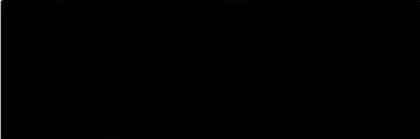
United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
JOSHUA SHENKMAN, DEMOCRATIC STAFF DIRECTOR

Sean M. Akins, Esq.



January 28, 2020

Dear Mr. Akins:

This is our final letter to you demanding that your client, Mr. Robert McCullough, fully respond to the subpoena issued to him on September 12, 2019. On November 20, 2019, you sent us a letter (“November 20 letter”) discussing the efforts your client has made to produce documents pursuant to our requests and subpoena. That letter included a certification from your client in which he

certif[ied] that a diligent search, the details of which are described in the November 20, 2019, letter accompanying this certification and in the October 15, 2019, letter previously submitted to the United States Senate Committee on Finance, has been completed of the documents in my possession, custody, or control that reasonably could contain documents responsive to the Committee’s September 12, 2019, Subpoena, and all documents located during the search as described in the October 15 and November 14 letters that are responsive have been produced to the Committee.

Both that November 20 letter and its accompanying certification are attached to this letter. They describe production efforts that are not complete. The November 20 letter states, “EcoVest will produce to the Committee any additional responsive communications that it identifies in connection with ongoing litigation in the United States District Court for the Northern District of Georgia.” When you initially met with our respective staffs in April 2019, they generally communicated to you that they would accept rolling productions of documents, as they did with every other subject of this investigation, and that such rolling productions would be forthcoming just as they would be forthcoming in your client’s litigation in the Northern District of Georgia. Our staffs, however, did not agree to an unlimited timeframe in a manner that would make our investigation of conservation easements seemingly subordinate to your client’s litigation in the Northern District of Georgia.

In that litigation, your client, along with other “EcoVest Parties,” appear to have told the Court hearing that case,

On January 6, 2020, the EcoVest Parties produced 47,587 documents consisting of responsive emails and attachments. The EcoVest Parties are continuing to review and produce additional emails and attachments that hit on the broad search terms requested by Plaintiff, and can be prepared to substantially complete their document production by February 15, 2020.¹

We did not receive a production of documents from your client at any time in the last few weeks that might coincide with the January 6, 2020 production of documents mentioned above. We understand the possibility that the documents responsive in that litigation might not entirely correspond with the documents requested in our subpoena to you, but we suspect there should be substantial overlap between the two. Given the sizeable number of documents your client mentions to the Court as being at issue in both recent and forthcoming productions in that case, we are at a loss to understand how your client can certify accurately to having produced all responsive documents found pursuant to a diligent search of 47,587 documents that have recently been produced in ongoing litigation – with more to come – but none produced in response to our subpoena. To that end, we expect full compliance to our subpoena by February 25, 2020.

In the subpoena, the Committee requested “communications made prior to an investor’s participation in the transaction, including but not limited to presentations, memoranda, letters, emails, and notes, however formal or informal, describing the investment opportunities or the amount of tax benefits expected as a result of or potential result of the investment.” This obviously includes emails. But you responded to us that EcoVest did not search for all responsive emails. Rather, EcoVest relied on FINRA regulations that purportedly “prohibit the use of promotional materials unless they have been reviewed and filed with FINRA,” and EcoVest’s internal “policy of promoting investments, describing investment opportunities, and quantifying any possible tax benefits exclusively in Private Placement Memoranda (each a ‘PPM’) distributed to broker dealers, financial advisors, and prospective investors.” Based on these circumstances, you decided to search a subset of emails “[t]o confirm ... EcoVest’s policy of limiting promotional communications to the PPM was adhered to and that there are few if any additional communications that promote the investments[.]” While you claim that FINRA regulations and company policy would prohibit emails containing responsive material beyond the PPM, our experience in this investigation with other entities, equally subject to FINRA, is to the contrary. Searching a self-selected group of emails and declaring that nothing relevant was uncovered, and, therefore, no further search is necessary is insufficient to meet your duty under the subpoena to produce responsive materials unless there is a legal basis for withholding. Accordingly, Mr. McCullough has failed to fully comply with the subpoena by failing to produce all responsive emails.²

¹Joint Proposed Amended Scheduling Order at 9-10, United States v. Zak, et al., No. 1:18-cv-05774-AT (N.D. Ga. Jan. 6, 2020).

²In a letter to you dated November 4, 2019, we took exception to your client’s failure to produce (1) investor information and (2) email correspondence, among other issues. Since then, we have received investor information from you and your client, and this letter does not regard production of such information, although we obviously may have follow-up questions about such produced information at a later date.

It has now been ten months since the Committee first sought materials from Mr. McCullough and over four months since a subpoena was served on him requiring the production of responsive documents. In sum, your client's response to the subpoena has been inadequate to meet his duties under it. The Committee will provide Mr. McCullough until February 25, 2020 to complete a full search of potentially responsive emails and provide any remaining responsive documents that have not yet been produced. At that point, should Mr. McCullough continue to object to the subpoena and withhold documents, the Committee will consider those objections, along with any additional authority or argument you wish to provide in writing by the above date, and determine whether it may be necessary to proceed towards criminal or civil enforcement of the subpoena.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on Finance



Ron Wyden
Ranking Member
Senate Committee on Finance